

**AUG 22 2003**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON  
U.S. COURT OF APPEALS

DAN L. SPRINGATE, individually as a  
devisee of the Will of Fred E. Springate,  
deceased, and as Executor of the Estate of  
Fred E. Springate,

Plaintiff - Appellee,

v.

WEIGHMASTERS MURPHY, INC.;  
MONEY PURCHASE PENSION PLAN;  
CHARLES E. MURPHY; JOHN E.  
MURPHY; FRANK MURPHY,

Defendants - Appellants.

No. 02-56346

D.C. No. CV-01-03551-DT

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted August 4, 2003  
Pasadena, California

Before: KOZINSKI and T.G. NELSON, Circuit Judges, and RESTANI,\*\*  
Court of International Trade Judge.

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\* This disposition is not appropriate for publication and may not be cited to or  
by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Jane A. Restani, Judge, United States Court of  
International Trade, sitting by designation.

Weighmasters Murphy, Inc., the Money Purchase Pension Plan (“Plan”), Charles Murphy, John Murphy, and Frank Murphy (“Appellants”) appeal the district court’s grant of summary judgment in favor of Dan Springate. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Reviewing summary judgment de novo,<sup>1</sup> we find that the district court properly held Appellants liable for breach of their fiduciary duties.<sup>2</sup> Appellants concede that they breached their duties.<sup>3</sup> Indeed, they were entirely unaware of their duties.<sup>4</sup>

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<sup>1</sup> *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

<sup>2</sup> 29 U.S.C. § 1109(a). Section 1109 provides:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

<sup>3</sup> Although Appellants dispute whether the Plan’s investment was diversified, their argument is without merit. Appellants had 97% of the Plan invested in two funds. This is hardly a diversified investment. *See, e.g., Donovan v. Mazzola*, 716 F.2d 1226, 1230, 1238 (9th Cir. 1983) (holding that two investments violated diversification requirement).

<sup>4</sup> 29 U.S.C. § 1104(a) (listing fiduciary duties).

The district court's award was not clear error.<sup>5</sup> The district court's calculation of loss beginning in the year that Appellants assumed sole responsibility over the Plan's administration properly attributed Appellants' breaches to the award.

The remainder of the issues Appellants raise are without merit.

Springate, as the prevailing party on appeal, is presumptively entitled to his attorney's fees. Appellants' culpability and the merits of their position in this appeal favor an award of attorney's fees and costs to Springate.<sup>6</sup> Springate shall file a motion and proof of his claim with the clerk for referral to the Appellate Commissioner.

AFFIRMED.

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<sup>5</sup> *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 520 n.2 (9th Cir. 1984).

<sup>6</sup> *Smith v. Ret. Fund Trust*, 857 F.2d 587, 592 (9th Cir. 1988).